In the Supreme Court of the United States.

JOSHUA BISHOP, APPELLANT,
v.
THE UNITED STATES.
No. 92.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant was dismissed from the United States Navy, as a lieutenant-commander in that service, on February 8, 1868, by the President of the United States, pursuant to the sentence of a general court-martial. On March 8, 1871, pursuant to a special act of Congress, he was again appointed by the President and commissioned as a lieutenant-commander in the Navy, to date from March 1, 1871. On December 31, 1896, he was transferred to the retired list of the Navy, pursuant to section 1453 of the Revised Statutes. He brought this suit in the Court of Claims to recover the pay of his grade as lieutenant-commander for the time he was so out of the service, on the grounds that he was illegally dismissed by the President on ~~December~~ February 8, 1868, because, as he alleges, the said dismissal was illegal and void. The Court of Claims rendered a judgment against him in the suit and dismissed his petition, and he has appealed from that judgment.

Appellant makes no formal assignment of errors. His brief states (pp. 1, 2) that: "Appellant's contention in extenso appears by his Petition (P. 1–6, Transcript)," and that his "contention, in substance, is that he is entitled to his claim, because he never was legally out of the Naval Service of the United States; that he was illegally deprived of his rank and pay by virtue of an illegal sentence of an illegal court-martial and illegal dismissal from the Naval Service." Then he goes on to state in his brief a number of "POINTS," in which he cites the proceedings of the court-martial, a transcript of which is attached to said petition. The proceedings of the general court-martial referred to are not set forth in the findings of fact made by the court below. Probably they are substantially set forth in the transcript attached to the petition, and we have no objection to appellant referring to the court-martial *proceedings* if this court will permit him to do so, because it is not our desire to defeat this appeal by any legal technicalities.

So far as we can ascertain from appellant's brief what the errors of the court below complained of are, they are stated under five points, as follows:

POINT I.

"That the alleged court-martial had no jurisdiction over him, because he had already been punished for the alleged offenses charged against him. The alleged offenses occurred on the 30th day of May, 1867, in the harbor of Nagasaki, Japan."

POINT II.

"That the court-martial that tried him was illegally constituted."

POINT III.

"Said court-martial proceedings are void, because Rear-Admiral H. H. Bell, who convened said court, did not approve or confirm the findings and sentence of said court."

POINT IV.

"That said proceedings and sentence, as well as the order of dismissal (p. 30, transcript), are absolutely void, because the appellant, a lieutenant-commander and a commissioned officer of the Navy of the United States, was dismissed from the naval service by the sentence of a court-martial without said sentence being confirmed by the President of the United States."

POINT V.

"That he was not lawfully out of the naval service, and is therefore entitled to pay in amount as found by the Court of Claims."

These alleged errors are all founded upon the *proceedings* of the said general court-martial attached to the petition, and the action of the Secretary of the Navy and of the President of the United States upon the court-martial record and said sentence of dismissal. That action is set forth in Finding V of the Court of Claims. (Rec., pp. 29, 30.)

ARGUMENT FOR APPELLEE.

Our contention is that the general court-martial referred to was legally appointed and constituted as set forth in Finding III of the court below (R., 27); and

that the said court-martial had full jurisdiction over the person of and the offense charged against Lieutenant-Commander Bishop, and lawfully sentenced him "to be dismissed from the naval service of the United States," as set forth in Finding IV (R., 27, 28); and, furthermore, that no law of Congress required the rear-admiral commanding the United States Asiatic Squadron to act upon the said proceedings of the general naval court-martial referred to, other than to forward them to the honorable Secretary of the Navy for the action of the President of the United States, which was duly done. (Ib., R., 29.)

In making the above-mentioned "*points*" appellant states a number of minor points and argues them. They were all argued in our brief for the United States filed in the court below, and, as we do not desire to say anything in response to this appeal which was not plainly and clearly stated in that brief, we shall now content ourselves with relying upon the argument made to the court below in that brief, which was as follows:

The petition in this case sets forth a claim for the pay of a lieutenant-commander in the Navy of the United States from February 9, 1868, to March 9, 1871, in the sum of $8,067.99, and the claim is made under the provisions of a private act of Congress, approved June 6, 1900 (31 Stat., 1612), entitled:

AN ACT for the relief of Joshua Bishop.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of Joshua Bishop for alleged items of pay due and unpaid

> to him for services as a lieutenant-commander, United States Navy, between the dates of September thirteenth, eighteen hundred and sixty-seven, and March ninth, eighteen hundred and seventy-one, be, and the same is hereby, referred to the Court of Claims. Jurisdiction is hereby conferred on said court to try said cause—the statute of limitation shall not apply thereto—and to render final judgment therein, subject to the right of appeal by either party.

During most of the time mentioned in this act the claimant was not in the service of the United States as an officer of the Navy or in any other position or capacity. He held the office of lieutenant-commander in the Navy until February 8, 1868, and was paid as such up to that time. On that date he was dismissed from that service in pursuance of a sentence of court-martial, which was approved by the President, as set forth in a letter addressed to him by the Secretary of the Navy, which is printed [in Finding V R., 30] on page 2 of the petition.

I.

THE FIRST QUESTION WHICH THE CASE PRESENTS IS AS TO THE JURISDICTION OF THIS COURT.

The legal effect of the above-quoted private act is to confer jurisdiction upon the Court of Claims "to try said cause, * * * and to render final judgment therein, subject to the right of appeal by either party."

In other words, Congress has enabled the Court of Claims to take jurisdiction of the claim, notwithstanding the bar of the statute of limitations (section 1069,

R. S.), but only in so far as the court could have taken jurisdiction of it if a petition setting forth the claim had been filed within six years after February 8, 1868.

The claimant [appellant] appears to have construed this private act, as far as may be inferred from his requests for findings of fact, as authorizing the court to *review the proceedings and sentence* of the general court-martial which tried and convicted him and sentenced him to be dismissed from the service in September, 1867. The obvious and unanswerable reply to this contention is that to give such unprecedented jurisdiction it must be granted in plain and most unmistakable words. But the act admits of no construction; properly interpreted it merely removes the bar of the statute of limitations and leaves the claim to be determined according to the ordinary jurisdiction of the court in like court-martial cases.

In regard to *the question of jurisdiction* this private act is similar to the private act which conferred jurisdiction of the claim of Joseph M. Cumming *et al.* upon this court in 1885. That claim was for damages for the tortious seizure of the claimants' commission houses and bonded warehouses and the breaking up and interrupting of their business by a collector of internal revenue. The act read that claimants "* * * be permitted to sue in the Court of Claims; which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer" * * *; and that "the United States shall appear to defend against said suit, and either party may appeal

to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitation to the contrary notwithstanding." (22 C. Cls. R., 345.)

The claimants in that case recovered a judgment in this court for the damages alleged; but on appeal to the Supreme Court the judgment was reversed on the grounds that the act merely waived a defense based upon the statute of limitations, and did not waive any defense based upon the non liability of the United States for the damages complained of. (*United States* v. *Cummings*, 130 U. S., 452.) Speaking of the private act in that case, Mr. Justice Harlan, when delivering the opinion of the Supreme Court, said: "The only right waived by the Government was a defense based upon the statute of limitations. (*Erwin* v. *United States*, 97 U. S., 392; *Tilson* v *United States*, 100 U. S., 43; *McClure* v. *United States*, 116 U. S., 145.)" And he laid it down as a principle of jurisdiction under such private acts "that the liability of the Government should be determined by the settled principles of law," unless an intention to the contrary be "expressed in language not to be misunderstood."

In *Erwin's case* "jurisdiction of the claims of Robert Erwin" was given to the Court of Claims under the provisions of the act of March 12, 1863 (the abandoned and captured property act), by a private act which was passed for his relief on February 5, 1877 (19 Stat., 509), because the "claims were, by accident or mistake of his agent or attorney, and without fault

or neglect on his part, as was claimed, not filed within the time limited by said act." The Supreme Court, affirming the judgment of this court in that case, held that the private act did not waive any defense under the bankrupt act.

In *Tillson's case* the claim was for damages for breach of contract by the United States in respect to the time and manner of payment. It was referred to the Court of Claims by a private act which "authorized and directed" the court "to investigate the same, and to ascertain, determine, and adjudge the amount equitably due, * * * if any, for such loss and damage;" and it was held that the general provision of law against the payment of interest in such cases was not waived by the private act. Speaking of its language, Mr. Chief Justice Waite, delivering the opinion of the Supreme Court affirming the judgment of this court, said:

> We have no doubt it was the wish of those who procured the passage of the special act, under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for the court to give a judgment against the United States at least for interest, in case it should be found that payments on the contract held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power. * * * The same principles of jurisprudence

and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction.

In *McClure's case* a private act referred his claims to the Court of Claims "with jurisdiction to hear and determine said claims." The act said that if the court should be satisfied from the evidence that any of the moneys charged to him "were not in fact received by him, or that other just and equitable grounds exist for credits claimed by him," it should "make a decree," etc., in his favor. It was contended in that case that the private act conferred equity jurisdiction upon the court; but the Supreme Court, *held*, that it conferred only the ordinary jurisdiction of the Court of Claims of the subject as a court of law, and said that the suit "clearly comes within the principle of *Tillson's case*" (*supra*).

The principle established by these cases is this:

> *When claims are referred to the Court of Claims by private acts of Congress, with jurisdiction to hear and determine the same, or to "try the cause" (as in the case at bar), only the ordinary jurisdiction of the court is invoked, and no legal or equitable defense is waived unless the act expressly, or by necessary construction, so provides.*

It is no answer to this rule of jurisdiction to say that the act was passed expressly "for the relief" of the plaintiff. Replying to that suggestion in *Cummings' case*, Mr. Justice Harlan said:

"A satisfactory answer to this suggestion is

> that if Congress intended to do more than give the plaintiffs an opportunity, in an action for damages brought in the Court of Claims, to test the question as to the liability of the United States, upon the law and facts, for the alleged wrongs of their officers, that intention would be expressed in language not to be misunderstood. It is as if the plaintiffs asserted before Congress the liability, in law, of the Government for the damages they sustained, and Congress permitted them to invoke the jurisdiction of the Court of Claims in order that there might be a judicial determination of the question by that tribunal, with the right of appeal "as in ordinary cases against the United States in said court."

This is exactly what the private act for the relief of the present claimant has done. For years he had been appealing to Congress by petitions alleging that he was the victim of a sentence of an illegal naval general court-martial, and was illegally deprived of his commission and pay; and at last Congress "referred" *not these complaints* to the Court of Claims, but only, as the private act says:

> The claim of Joshua Bishop for alleged items of pay due and unpaid to him for services as a lieutenant-commander, United States Navy, between the dates of September 13, 1867, and March 9, 1871.

This act confers no other jurisdiction upon the Court of Claims than "to try said cause." What cause? Certainly the only answer is the cause so referred—the

claim "for alleged items of pay * * * for services as a lieutenant-commander, United States Navy." Suppose the claimant had already been fully paid that pay, would the private act estop the Government from that defense? Suppose he had been promoted to the rank of commander and was so serving and paid for that time, would the Government be estopped from that defense? If not, is there any reason or rule of construction or interpretation that would estop the defendants from showing that claimant—

1. Was not in fact or in law, during the time mentioned, in the service of the United States as a lieutenant-commander; or

2. That the "alleged items of pay" were not due him, because on February 8, 1868, he was dismissed from the naval service of the United States pursuant to the sentence of a naval general court-martial, which was approved by the President; or

3. That he was dismissed from his office by the President without trial by a court-martial; or

4. That the vacancy caused by his dismissal from office was filled by the President, by and with the advice and consent of the Senate?

These are all valid legal defenses to the kind of claim set forth in the petition.

II.

The facts that the claimant was dismissed from the Navy pursuant to the sentence of a naval general court-martial which had jurisdiction of his person and of the offenses of which he was convicted, and that the

vacancy in office created by his dismissal was no doubt filled by the President by the appointment of a successor, by and with the advice and consent of the Senate, would seem to leave nothing for the court to do but to find these facts and to dismiss the petition. But as a number of suits involving the validity of the sentences of naval general courts-martial are now pending here, and as many seamen in the naval service have been falsely or mistakenly advised that they can obtain relief in this court from such sentences on various technical grounds based upon alleged errors of procedure which are wholly untenable, it will not, perhaps, be out of place to give a little consideration to some of the alleged errors of the court-martial in the present case, as presented in this petition.

The claimant does not allege directly in his petition that he was dismissed from the naval service pursuant to the sentence of a court-martial. The fact is, however, stated inferentially, by setting forth, in paragraph II, a letter of dismissal addressed to him by the Secretary of the Navy on February 8, 1868. It should have been stated positively; but all the petition is likewise defective.

The petitioner avers in paragraph III, citing the articles for the government of the Navy in the act of July 17, 1862 (12 Stat., p. 600), that his "alleged dismissal" mentioned in that letter was "illegal and utterly void," meaning that "the alleged court-martial proceedings * * * were from the beginning utterly illegal and void," on the following grounds:

1. That the court-martial "was not legally constituted," as required by Article 2, in that "it does not appear on the face of the said alleged court-martial proceedings that no more officers other than those named, who composed said alleged court, could be summoned to compose a court of thirteen members without injury to the service."

2. That H. H. Bell, rear-admiral commanding Asiatic Squadron, who convened said alleged court-martial, did not review the proceedings of said alleged court, and did not approve or confirm the findings and sentence of said alleged court, as directed and required by article 20.

3. That "said alleged sentence" of dismissal * * * was not confirmed by the President, "as required by article 19."

If this court had jurisdiction to review these "alleged" errors, our answer to the first alleged error would be that the officer who convened the court-martial was the sole and exclusive judge of the question as to whether the court could be composed of a lesser number of officers than thirteen "without injury to the service." Nothing in the act of Congress requires the appointing officer to state that conclusion in his prescript or elsewhere. (*Martin* v. *Mott*, 12 Wheat., 19, 31; *Mullan* v. *United States*, 140 U. S., 240, 245.)

As to the second alleged error, nothing in Article 20 or any other act of Congress required the convening officer to review the proceedings of the said court-martial or to approve or confirm its sentence.

As to the third alleged error, Article 19 was strictly complied with. The sentence of dismissal was approved by the President of the United States. As to the *manner* of the approval, the statute gives no directions. The approval may be oral or in writing, or in any other manner that the President in his discretion pleases. (*United States* v. *Page*, 137 U. S., 673, 679; *United States* v. *Fletcher*, 148 U. S., 84.) It does not require the President to personally review the proceedings of a court-martial, or even to see them. Those matters are usually attended to for the President by the proper officers of the Navy Department.

The other averments in this paragraph of the petition are what may be called conclusions of law, *e. g.:*

4. That "the findings and sentence of the court" were unjust.

5. That the record of the proceedings "are not in form or substance sufficient in law" to warrant claimant's dismissal set forth in Paragraph II.

6. That the "findings" of the court-martial "were contrary to the evidence and weight of evidence."

The last averment of this paragraph is to the effect that claimant "used every due diligence and effort to have said and every of said orders and proceedings set aside, for nothing holden, and to be restored to his place and rights in grade and pay." This averment, which is wholly immaterial, we are willing to admit, although it does not appear that claimant ever applied to the President or to any court of competent jurisdiction for such relief, or even tried to obtain a judgment

in this court for his pay upon the grounds that the court-martial sentence was null, or void, or for any other reason. He now comes here for the first time, under the above-mentioned private act, which merely waives the statute of limitations in his behalf, and leaves the cause to be determined under the general rules of law applicable to such claims as if they were presented to the court within six years after they first accrued. He asks the court to include these and other irrelevant allegations in the findings of fact. To all such requests we object, on the ground that to allow them would be as erroneous as to grant prayers of instruction to a jury submitting matters of conjecture as evidence on which they might base a verdict. (*Northern Pacific R. R.* v. *Perrien*, 167 U. S., 48–56.) This is not an appellate court for court-martial cases.

In this view of the case the main and only question of law before the court is as to the jurisdiction of the court-martial which sentenced Lieutenant-Commander Bishop to be dismissed from the naval service.

In such cases, said Chief Justice Drake, delivering the opinion of the court in *Keyes* v. *United States*—a court-martial case—(15 C. Cls. R., 532–541):

> No doctrine is better settled than that judicial proceedings can be assailed or questioned collaterally only when the court in which they occurred was without jurisdiction to take them.

And his honor, the present Chief Justice of the Court of Claims, concurring, said: "I am of the opinion that when an officer has been removed and his

successor appointed and confirmed, this court can not inquire into the legality or regularity of his removal."

In that case the court-martial was appointed on February 1, 1877, and its sentence of dismissal was approved by the President, to take effect on April 20, 1877. Affirming the judgment of this court in that case (109 U. S., 336, 339), Mr. Justice Blatchford, delivering the opinion of the Supreme Court, said:

> It was held by this court in *Blake* v. *United States* (103 U. S., 227), that the President has the power to supersede or remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and that such power was not withdrawn by the provision of § 5 of the act of July 13th, 1866, c. 176, 14 Stat., 92, now embodied in § 1229 of the Revised Statutes, that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." It was held that this provision did not restrict the power of the President, by and with the advise and consent of the Senate, to displace officers of the Army or Navy by the appointment of others in their places.

(Affirmed again in *Chrenshaw* v. *United States*, 134 U. S., 99, 107; *Mullan* v. *United States*, 140 U. S., 240, 245; and *Parsons* v. *United States*, 167 U. S., 343.)

The doctrine so stated was held sufficient for the affirmance of the judgment of this court which dis-

missed the petition in that case. Nevertheless, Mr. Justice Blatchford, answering the contention of counsel that the record of the court-martial must affirmatively show not only jurisdiction, but regularity of proceedings, said:

> That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid, when it is questioned in this collateral way. (*Thompson* v. *Tolmie*, 2 Peters, 157; *Voorhees* v. *Bank of United States*, 10 id., 449; *Cornett* v. *Williams*, 20 Wallace, 226, 249.) This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial which was sought to be reviewed on a writ of *habeas corpus*. (*Ex parte Reed*, 100 U. S., 13.)
>
> Where there is no law authorizing the court-martial, or when the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment. Of that character are the authorities cited and relied on by the appellants; but they do not apply to the present case.

The doctrine here stated is that whatever irregularities or errors are alleged to have occurred *in the proceedings*, "the sentence of a court-martial must be held valid when it is questioned in a collateral way, if the

court-martial had jurisdiction of the accused and of the offense charged against him." And this is again affirmed and reaffirmed in *Johnson* v. *Sayre*, 158 U. S., 109, and *Carter* v. *McClaughry*, 183 U. S., 365.

Now, it may be asked, What irregularities or errors does the word "proceedings" include? It is evidently used as a law term, and the Supreme Court at the preceding term of 1882 furnished a very comprehensive definition. Mr. Justice Miller, delivering the opinion of the court in *Kring* v. *Missouri* (107 U. S., 221, 231), said: "The word 'procedure' as a law term is not well understood;" and adopting its definition by Bishop, "the distinguished writer on criminal law in America," he defined its meaning as follows:

> The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms—pleading, evidence, and practice. * * * The word [practice] means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and evidence, he says, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.

In *Swain* v. *United States* (165 U. S., 553, 565) the doctrine is well reaffirmed that—*Where a court-martial had jurisdiction over the person and the case, its proceedings can not be collaterally impeached for any mere error*

or irregularity committed within the sphere of its authority. All of the many errors alleged in that case were alleged errors of procedure (28 C. Cls. R., 216). "These," said our now Chief Justice, "can not be reviewed collaterally;" and in affirming the judgment of the Court of Claims in that case the Supreme Court said that instead of considering the several propositions urged by counsel, "we might well content ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott." See *Johnson* v. *Sayre*, 158 U. S., 109, and also *Carter* v. *McClaughry*, 183 U. S., 365, where the rule is "*reiterated*" *that civil tribunals will not revise the proceedings of courts-martial, except for the purpose of ascertaining whether they have jurisdiction of the person and of the subject-matter, and whether, though having such jurisdiction, they have exceeded their powers in the sentence pronounced.*

ALL THAT ANY CIVIL OR CRIMINAL JUDICIAL COURT CAN DO IN A COURT-MARTIAL CASE IS LIMITED TO QUESTIONS RESPECTING THE JURISDICTION OF THE COURT-MARTIAL.

It is well settled that if the court-martial have jurisdiction of the person to be tried and of the offense charged against him, the President of the United States alone has the power to review its proceedings when a commissioned officer is sentenced to be dismissed. He is "the court of last resort" (*Carter's case*, *supra*, 385), but the "review" may be by the Secretary of the Navy or the Attorney-General (*ib.*, 373, 386), and on that review the President may "approve" the sen

tence. Speaking for the Supreme Court in *Elliott* v. *Piersol* (1 Pet., 328), Mr. Justice Trumble said:

> When a court has jurisdiction, it has the right to decide every question which occurs in the cause. And whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. * * * They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

As the Secretary of the Navy and the President of the United States were the persons concerned in the execution of the sentence of dismissal in Lieutenant-Commander Bishop's case, we might be allowed to question the liability of these officials, on the facts of this case, if claimant had sued them in an action of trespass. He wisely did not attempt to sue. But at this late date—more than thirty years after his dismissal from the Navy, when everybody concerned in his dismissal has long since died, and long after the responsible officers of the court could have been sued for trespass[a]—claimant now alleges that the whole proceedings of the court-martial were void and his dismissal therefore utterly void.

When Congress generously authorized the President to reappoint him as lieutenant-commander in the Navy, and his new commission in that grade was sent to him,

[a] According to this view, claimant's case would be one "sounding in tort," and hence the private act would not give this court jurisdiction of it. (Cummings' case, *ante*.)

he wrote on March 9, 1871, a letter of acceptance to the Secretary of the Navy, in which he stated that he did not voluntarily surrender his claim to the effect that up to that time he had been a lieutenant-commander in the Navy by virtue of a commission dated March 3, 1865, and was never legally deprived of that commission. Answering that communication the Secretary of the Navy, on March 18, 1871, peremptorily informed him that the Department declined to receive such an acceptance, and that the acceptance must be unconditional and disconnected with any other matter. The claimant, recognizing the mistake he had made, most respectfully complied with the Secretary's requirement, and forwarded, on March 27, 1871, a proper letter of acceptance. (Finding VII, R., 31.)

It might here be said that claimant at that time waived all consideration of any claim he might have had growing out of his court-martial and dismissal from the Navy.

Another estoppel might be raised in this case, founded on Article 37, section 1624, of the Revised Statutes, if claimant's contentions could be sustained. That article—if it could be regarded as binding upon the President—provides that—

> *When any officer who is dismissed by order of the President makes, in writing, an application for trial [by court-martial], setting forth under oath that he had been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such*

officer on the charges on which he shall have been dismissed. And if such a court-martial shall not have been convened within six months of the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

The claimant now contends that he was never tried by court-martial, on the grounds that the court which tried him was an illegal court; but, in that view of the case, he might have availed himself of the provisions of this article. There was nothing to prevent his making an application to the President under it within a reasonable time, or at least before all the important witnesses were dead. For this reason alone he should not be allowed in any civil court to question the legality of his trial and dismissal from the service. But it is altogether unnecessary to resort to the doctrine of estoppel; he *was* legally tried and dismissed.

III.

But whether the court-martial had or had not jurisdiction in the case of the claimant, it is submitted that he can not recover upon the claim presented in his petition, because it is laid down in *Blake* v. *United States* (103 U. S., 227) as sound constitutional doctrine that "The President has the power to supersede or remove an officer of the Army or Navy by the appointment, by and with the advice and consent of the Senate, of his successor." The principle decided in that case is that when an army or navy officer has been dismissed

from office the filling of the vacancy caused by his removal by the appointment of another person to that vacancy, by and with the advice and consent of the Senate, ratifies the removal, and consequently ratifies the action of the official or officer who made the removal.

This principle is too well settled to be questioned now; but if it should be held that it does not apply here, our answer is that it is not necessary to apply it, because, in contemplation of law, claimant was dismissed by the President of the United States, and therefore it is unnecessary to say anything about filling a vacancy in office.

CLAIMANT'S DISMISSAL FROM OFFICE BY THE SECRETARY OF THE NAVY WAS A DISMISSAL BY THE PRESIDENT OF THE UNITED STATES.

No question has been made in this case denying the *fact* that the claimant was dismissed from the Navy "in pursuance of the sentence of a general court-martial," as prescribed in article 36, section 1624, of the Revised Statutes (act July 13, 1866, section 5, 14 Stats., 92); nor has it been alleged that he was not dismissed by the President. Obviously the latter allegation could not be sustained. It is true that the letter of dismissal set forth in the petition was written by the Secretary of the Navy, but Mr. Bishop's dismissal must be regarded as the act of the President. It is true that in Carter's case the officer was dismissed "By direction of the Secretary of War"—"By command of Major-General Miles: H. C. Corbin, Adjutant-General" (183 U. S., 374). But that mode of dismissal was not questioned by the Supreme Court. It is a well-settled principle

that the Secretary of the Navy is the regularly constituted organ of the President for the administration of the naval establishment of the nation, and that rules and orders publicly proclaimed by him must be regarded as the acts of the President (*Eliason* v. *United States*, 16 Pet., 291–302). Many cases might be cited in support of this doctrine; a few will suffice. In *Wilcox* v. *Jackson* (13 Pet., 498–513) an act of Congress provided that reservations of public lands should be made by order of the President. The land at Fort Dearborn, near the mouth of the Chicago River, was mapped out as a military reservation by the General Land Office at the request of the Secretary of War, and no order of the President for that reservation appeared in the record. Mr. Justice Barbour, delivering the opinion of the Supreme Court, said:

> Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by the order of the President, within the terms of the act of Congress.

The mode of approving the sentence of the general court-martial and of the dismissal of the officer in the case at bar, and as to whether it was wisely or unwisely adopted, can not be questioned in this court, because:

> "The right of so considering and treating the authority of the Executive, vested as he is with the command of the military and naval forces, would not be intrusted to officers of any grade inferior to the commander in chief; its consequences, if tolerated, would be a complete disorganization of both the Army and Navy." (*United States* v. *Eliason, supra.*)

And it is not vested in any civil court.

The same doctrine is recognized in *Williams* v. *United States.* (1 How., 290–297.) Delivering the opinion of the Supreme Court in that case, Mr. Justice Daniel, referring to the act of Congress of January 31, 1823, which expressly prohibited the advancing of public money in any case whatsoever, except under the special direction of the President to the disbursing officers of the Government, and answering the contention that the correct interpretation of the statute required this direction to be given in every instance under the President's own hand, said:

> Such an interpretation of the law this court can by no means admit. * * * The President's duty in general requires his superintendence of the administration; yet this duty can not require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incidental to services, which, nevertheless, he is, in

> a correct sense, by the Constitution and laws, required and expected to perform. This can not be * * * because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It can not be, for the stronger reason, that it is impracticable, nay, impossible.

What time has the Chief Executive to personally review proceedings of courts-martial?

As the President approved the sentence of the court-martial, it might be said that in effect the claimant was then and there dismissed by operation of law, and there only remained the ministerial duty of informing him of his dismissal from the Navy; therefore, whether the President directly reviewed the record or wrote the letter of dismissal or used his proper instrument, the Secretary of the Navy, for that purpose is not material. (*United States* v. *Page*, 137 U. S., 673; *United States* v. *Fletcher*, 148 U. S., 84; *Ide* v. *United States*, 150 U. S., 517; *Carter* v. *McClaughry*, 183 U. S., 365.) The claimant was dismissed from the service by the approval of the sentence of the court-martial by the President; or else he was dismissed by the President for some other reason which does not appear in the case, and in respect to which no court has jurisdiction to inquire.

IV.

THE PRESIDENT OF THE UNITED STATES HAS UNRESTRAINED POWER TO REVOKE THE COMMISSION OF ANY OFFICER OF THE ARMY OR NAVY FOR ANY REASON SATISFACTORY TO HIMSELF.

Delivering the unanimous opinion of the Supreme Court in *Crenshaw* v. *United States* (134 U. S., 99–107), Mr. Justice Lamar, referring to *Blake* v. *United States* (103 U. S., 227), wherein the opinion of the Attorney-General was quoted with approval to the effect that in respect to their official tenure "there is no difference in law between officers in the Army and other officers of the Government," said:

> Applying the above principles it remains to say that we know of no instance in which their assertion is more imperatively demanded by the public welfare than in this case, and such others as this. If the position taken by the appellant is correct, then a logical and unavoidable result is, that our country, if ever we are so unfortunate as to be again involved in war, will be compelled, after the treaty of peace, to maintain the entire official force of the Army and Navy, and a host of sinecurists in full pay so long as they shall live; either that or to disband the Army and Navy before the peace shall be made, even this wholly inadmissible alternative being legally possible from one of appellant's positions. It is impossible to believe that such a condition of affairs was ever contemplated by the framers of our organic or statute law.

This was a case where the claimant sued in this court for pay as an officer of the Navy after he was discharged by the Secretary of the Navy. He claimed that he had a contract right to the pay, but the Supreme Court *held* that he had no such right; that where an officer is appointed for a definite time, or during good behavior, he has no vested interest or contract right in his office, and that article 36, section 1624 of the Revised Statutes, does not vest naval officers with any contract right to their offices or the salaries thereof, or give them any vested interest in the same. In respect to this point, Mr. Justice Lamar said:

> Our courts, both State and National, look on these questions through the form to the substance of things; and, in substance, the statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revokable by the sovereignty at will; * * *

This case also confirms the well-settled principle that when an officer, either civil or military, has been removed from his office by competent authority, he has no valid claim to the emoluments of the office from which he has been removed.

The question as to the constitutional power of the President to dismiss any officer of the United States before the expiration of his *statutory* term of office was

elaborately argued before and fully considered by both this court and the Supreme Court in the case of *Parsons* v. *United States* (30 C. Cls. R., 222; and 167 U. S., 324). Delivering the unanimous opinion of the Supreme Court affirming the judgment of this court, Mr. Justice Peckham, answering the contention of counsel for the appellant "that the President had no power to remove District Attorney Parsons from office prior to the expiration of the four years term of office prescribed by section 769 of the Revised Statutes, and to appoint a successor to him by and with the advice and consent of the Senate," said, that section 769, which provided that "district attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates," did not entitle the persons so appointed "to hold for four years as against any power of the President to remove, and in no event can they remain in office longer than that period without being reappointed. This construction of the act as one of limitation, we think, in the light of the history of the subject, is a most natural and proper one." (*Ib.*, 342.)

In the opening part of the opinion there is an able and elaborate review of the "constitutional history of the subject relating to the President's power of removal and the debates which have taken place in Congress in regard to it." (*Ib.*, 329–335.)

"The question," says Mr. Justice Peckham, "arose in the first session of the first Congress, which met immediately after the adoption of the Constitution."

The views of that Congress, of Madison, Adams, Kent, Marshall, Webster, and of other great statesmen and lawyers on this question are cited by him, and, adopting the language of Mr. Justice Thompson, speaking for the Supreme Court on the power of re-removal *In re Hennen*, 13 Pet., 230, 259, he said:

> No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution.

And further quoting from the unanimous opinion in that case, Mr. Justice Peckham said: In the early history of the Government it became "the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone in such cases [that is, where the tenure was not fixed by the Constitution], although the appointment of the officer was by the President and Senate."

The opinions of the law officers of the Government on this question are also cited by Mr. Justice Peckham as being "in harmony with the foregoing views." These opinions were to the effect that the President had the power to remove any officer of the United States whose term was not fixed by the Constitution.

"This power," said the learned justice, "has been recognized as extending to officers of the Army and Navy;" and he cites the opinion of Attorney-General Cushing in the case of *Lansing* (6 Op. Atty. Gen., 4); the case of *Colonel Belger* (12 Op. Atty. Gen., 421, 425); and the opinion of Attorney-General Devens (15 Op. Atty. Gen., 421). The question considered in these opinions was in respect to the power of the President alone to dismiss an officer from the military service; and he quotes with approval the following language of Attorney-General Cushing: "I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the Army and other officers of the Government. As a general rule, with the exception of judicial commissions, they all hold their offices by the same tenure in this respect."

> The foregoing references [said Mr. Justice Peckham] to debates and opinions have not been made for the purpose of assisting us in arriving at a decision of the question of the constitutional power of the President in his discretion to remove officials during the term for which they were appointed and notwithstanding the existence of a statute prohibiting such removal, but simply for the purpose of seeing what the views of the various Departments of the Government have been upon the subject of the power of the President to remove, and what claims were made and what acquiescence had been given to the proposition that to the President belonged the exclusive power

> of removal in all cases other than by way of impeachment. It is unnecessary for us in this case to determine the important question of constitutional power above stated.
>
> The short review we have taken throws light upon the question of the true construction of the language used by Congress in the section of the Revised Statute under examination.

According to that review and the authorities discussed in the unanimous opinion in Parson's case, the conclusion would seem to be inevitable that if it had been necessary to judicially determine in his case "the important question of constitutional power above stated," the Supreme Court would have *held* that the President of the United States has full power to remove from office any civil or military officer of the United States for any reason that may be satisfactory to himself, notwithstanding that there may be an act of Congress prescribing the term of the office or the cause of removal, or attempting to impose any restraint upon that power. Whether the case at bar requires that constitutional question to be determined is, of course, left to the discretion of the court.

Speaking of the provisions of the statute cited in *Parson's case*, which provided that certain officers of the United States were to be appointed for a term of four years, "but shall be removable from office at pleasure," Mr. Justice Peckham said that the purpose of Congress was not to grant an unconditional term of office for that period; that the statute was an act of limitation and not of grant; and that—

> The provision for the removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was regarded as being clothed with such power in any event. Considering the construction of the Constitution in this regard as given by the Congress, of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.

The constitutional principle recognized throughout the whole opinion in *Parson's case* is that the President has the power to remove from office any officer of the United States, except judges whose tenure has been fixed by the Constitution; and that statutes prescribing terms of office and tenure of office are to be construed in harmony with this principle. It therefore follows that, as the claimant was removed by the President from the office of lieutenant-commander on the active list of the Navy of the United States, it is not material to the merits of the present case to determine whether the court-martial before which he was tried had or had not jurisdiction, or whether they erred in any of their proceedings. The fact remains that he was dismissed

from his office by the action of the President. Congress subsequently recognized the validity of that dismissal by passing a special resolution authorizing the President to reappoint him, by and with the advice and consent of the Senate, to the office of lieutenant-commander. (16 Stat., 597.) Claimant accepted that appointment, thereby admitting to the fullest extent the validity of his dismissal from the Navy, and therefore we might say that he can not maintain a suit in this court for any part of the salary claimed in his petition.

But we do not care to resort to the doctrine of estoppel to escape a judicial determination of the important questions presented in the case.

In view of the large number of naval court-martial cases which are now encumbering the dockets of this court [Court of Claims] and imposing so much irksome and, we think, unnecessary work, not only upon the court, but also upon the Navy Department, we respectfully suggest that the jurisdiction of this court in such cases should be clearly defined. Until this is done, attempts will be made to instigate contempt in the naval service for military discipline by courts-martial, and of the Commander in Chief himself. Therefore, neither the sentences of these courts, nor the action of the President upon them, should ever be regarded as void by any civil courts *except upon the very clearest jurisdictional grounds.* When general courts-martial are convened by the Secretary of the Navy, or by the commander in chief of a fleet or squadron, in contemplation of law they are convened by the President himself as Commander in Chief of the Navy. He alone is "the court of

last resort" (*Carter's case, ante*), and all officers and seamen may appeal to him. In this respect, as well as in respect to the power of removal, his is the "sovereignty" mentioned by Mr. Justice Lamar (*Crenshaw* v. *United States, ante*).

As long as this constitutional sovereignty of the Commander in Chief is admitted and respected by the courts, our armies and navies will continue to be—what they always have been—INVINCIBLE. To quote from an article "On the Presidency," written a few years ago by a distinguished soldier and statesman of the highest authority—

> The President of the United States occupies a position of peculiar importance. In the whole world there is no other ruler, certainly no other ruler under free institutions, whose power compares with his. * * *

But while the powers of the Commander in Chief are sovereign, and plenary in every respect as to courts-martial and to removals from office, they are what the framers of the Constitution intended them to be—not autocratic; but are to be exercised with wisdom and discretion, and under a sense of responsibility to the people, similar to the sovereignty of Congress, of which it has been said by that greatest expounder of the Constitution, Chief Justice Marshall, when delivering the opinion of the Supreme Court in *Gibbons* v. *Ogden* (9 Wheat., 197):

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at

> elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

Thus the Government of the United States, as was stated by the same great jurist, is "emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit." (*McCulloch* v. *Maryland*, 4 Wheat., 316, 405; and Mr. Lincoln at Gettysburg).

The sovereign powers of the Commander in Chief of the armies and navies of the United States are therefore not to be restricted nor his action reviewed or reversed by even the highest judicial courts. They must always be presumed to be exercised for the benefit of the people.

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FELIX BRANNIGAN,
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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOSHUA BISHOP, APPELLANT,
v.
THE UNITED STATES. } No. 92.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In direct reply to the specific contentions of the appellant, the United States presents this additional brief.

POINT I.

The first point made in the brief of appellant is that the court-martial which tried the appellant had no jurisdiction, because he had already been punished for the alleged offense.

The appellant was charged at the court-martial proceedings with drunkenness and neglect of duty while serving as the executive officer of the United States steamer *Wyoming*, then lying in the harbor of Nagasaki, Japan. These offenses of which he was found guilty by the court-martial were committed on May 30, 1867, and on his return to his ship on the following morning he was suspended from duty by the officer in

command of the *Wyoming*, at some time from 4 to 8 in the morning, as shown by the log, and a report at once made of the whole matter to the rear-admiral commanding the squadron, who, on the same day, by letter to the commander of the *Wyoming*, ordered that the appellant be restored to duty to await an opportunity for time to investigate the case. Accordingly, at 6.40 p. m. of the same day, as appears by the log, the appellant was restored to duty. (Finding VI, Rec., p. 31, Exhibit E, claimant's petition, Rec., p. 23.)

There is nothing in these facts to show that the suspension of the appellant was in the nature of punishment for the offenses committed by him, nor that his restoration to duty was a termination of such punishment. On the contrary, it is perfectly evident that the appellant was so suspended pending a report of the commander of the *Wyoming* to the rear-admiral and instructions thereon, while the letter of the rear-admiral ordering that he be restored to duty, conclusively shows that such restoration was not intended as a termination of any punishment, since it specifies that it was done "to await an opportunity for time to investigate the case." And, indeed, nothing more preposterous can be imagined than that a mere suspension from duty for a period of about twelve hours was intended by the commanding officer of the ship and the commander of the fleet to be complete punishment for the grave offenses of drunkenness and neglect of duty charged against the appellant.

A subpoint of Point I is that if the suspension of the

appellant was not a punishment, it was an arrest in the court-martial proceedings, and that by the naval regulations he should have then and there been served with a copy of the charges and specifications. There is nothing in the record to support this contention, and nothing to show that appellant was arrested in any way at the time of his suspension from duty. On the contrary, the record shows explicitly that on the 5th of September, 1867 (by clerical error Finding II, as set forth in the transcript, reads December instead of September), the appellant was placed under arrest to await trial by court-martial and served a copy of charges. (Finding II, transcript, p. 26.) And this was the first and only arrest in the court-martial proceedings appearing on the record, at which time, as shown by the record, he was served with a copy of the charges against him, in full compliance with the naval regulations.

POINT II.

Appellant's second point is that the court-martial which tried him was illegally constituted, because composed of only seven members, and because the record of the court-martial does not show affirmatively that the full number of thirteen officers could not be convened without injury to the service.

This is fully answered in the opinion of the court below, as follows:

> In reply to this contention it may be said that the Supreme Court has held in substance that when the commander in chief of a squadron not in the waters of the United States convenes a

> court-martial to try an officer, the courts of the United States will assume, when his action in this respect is attacked collaterally, and nothing contrary appears on the face of the order convening the court, that he properly exercised his discretion, and that the trial of the accused by such a court could not be avoided without inconvenience to the service. (*Mullan* v. *The United States*, 140 U. S, 240.) That decision was in affirmance of the decision of this court (23 C. Cls. R., 40), in which is quoted approvingly, "Wherever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." (Rec., p. 41.)

Furthermore, the appellant raised no such objection to the court at the opening of the court-martial proceedings. On the contrary, when asked by the judge-advocate if he knew of any reason why the court should not proceed with his trial, he replied "No." (Rec., p. 7.)

POINT III.

The third point of appellant is that said court-martial proceedings were void, because the rear-admiral who convened the court did not appove or confirm the findings and sentence of the court.

Here again the opinion of the court below furnishes a complete answer:

> In this case the commanding officer transmitted the proceedings of the court to the Secretary of the Navy, for the consideration of the

President, without any suggestions, under the nineteenth article of the act for the better government of the Navy, approved July 17, 1862 (*supra*). The latter part of that article reads as follows: "All other sentences may be determined by a majority of votes, and carried into execution on confirmation of the commander of the fleet or officer ordering the court, except such as go to the dismission of a commissioned or warrant officer, which are first to be approved by the President of the United States." The action of the commanding officer was founded upon the construction of the law, that because the sentence involved the dismission of the claimant it did not require him to take any action in the matter, except to forward the papers to be submitted to the President, in which construction of the law, in the opinion of the court, the officer was correct, and his failure to take any further action did not have the effect to nullify the proceedings of the court-martial. (Rec., p. 40.)

POINT IV.

The final contention of the appellant is that the proceedings and sentence of the court-martial, as well as the order of dismissal, are absolutely void, because the sentence of the court-martial was not confirmed by the President of the United States.

It appears from Finding V (Rec., pp. 29 and 30) that a brief of the proceedings of the court-martial by which the appellant was tried and convicted, setting forth the charges and specifications and the sentence of the court "to be dismissed from the service of the

United States," and reciting that "the evidence in the case is positive and clear and the finding of the court sustained thereby," and that "the sentence of the court is just and proper," was, on the 3d day of December, 1867, submitted by the Secretary of the Navy to the President for his action and on the same day approved by the President. Also that this action was followed by the dismissal of the appellant from the naval service.

This record seems to be conclusive. Counsel for the appellant alleges in respect to it, to be sure, that this brief was prepared by a clerk, and that the President did not have before him the court-martial proceedings at any time, but there is nothing in the record to support this assertion. On the contrary, the presumption must be that the Secretary and the President performed the duties devolved upon them in the premises. *Fletcher* v. *The United States*, 148 U. S., 84, quoted in the opinion of the court in this case on page 39. And as the court below well said on this point:

> In this case the approval of the President is founded on a condition of facts which affirmatively shows that he was advised in the premises by a knowledge of the case. He might not have read the entire record, but he had such knowledge as would enable him to pass intelligently and knowingly upon the question of the regularity of the proceedings and the justice of the sentence.

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